United Nations E/C.18/2009/5

Economic and Social Council

Distr.: General
18 August 2009

Original: English

Committee of Experts on International Cooperation in Tax Matters
Fifth session
Geneva, 19-23 October 2009
Item 6 (k)
Discussion of substantive issues related to international cooperation in tax matters: transfer pricing, including a manual and checklist for developing countries

Transfer Pricing Practical Manual for Developing Countries

Note by the Secretariat*

Summary

The present note summarizes progress towards a United Nations Transfer Pricing Practical Manual for Developing Countries, and the objectives and guiding principles behind that work. A draft outline of the Manual is annexed for discussion by the Committee (the annex is being circulated without formal editing and in the original language of submission only).

* The views expressed in the present paper should not necessarily be taken as representing the views of the United Nations or the United Nations Tax Committee.

09-45184 (E) 280809

Please recycle

I. Introduction

Tax treaty process and a subgroup

1. At the fourth annual session of the Committee of Experts on International Cooperation in Tax Matters, the proposed United Nations Transfer Pricing Practical Manual for Developing Countries was noted.[1] The work arose from feedback to the Secretariat about the lack of clear and relevant guidance for developing countries on the issues of the policy and administrative aspects of applying transfer pricing analyses to some of the transactions of multinationals.

II. 2008 Amsterdam Meeting

2. An Ad Hoc Expert Group Meeting on Transfer Pricing: A Discussion of the Practical Issues for Developing Countries was organized by the Financing for Development Office of the United Nations Department of Economic and Social Affairs and held on 27 and 28 August 2008 at the International Bureau of Fiscal Documentation headquarters in Amsterdam.[2] Twenty-two experts participated in the meeting, comprising government officials, private practitioners, academics and non-governmental organizations (NGOs) from both developed and developing countries.

3. At the meeting, it was noted that the proper treatment of transfer pricing is a particular issue for the operations of multinational enterprises, since market pricing conditions are not generally applicable in such dealings, yet an approximation of such market-based pricing ("arm's length pricing") is usually called for in their affairs by tax administrations. In doing so, administrations are seeking to ensure that transfer mispricing is not used as a way of shifting profits or losses from one part of the group or company to another, as may be convenient for tax purposes from the taxpayer's point of view.

4. For example, profits might be made to appear to be earned in low or no-tax jurisdictions (thereby serving to reduce tax rates on taxable profits/incomes and associated tax obligations), and deductions/losses appear to be incurred in high-tax jurisdictions (thereby increasing allowable deductions for tax purposes), with the net effect of minimizing taxes for the group or legal entity, and in so doing, impacting on the legitimate tax revenues of different tax jurisdictions.

5. The meeting noted that:

(a) Transfer pricing is a major tax issue for both developing and developed countries, but for most developing countries there are special issues in terms of capability and information gaps in assessing transfer pricing, including the need to have effective domestic rules in place to properly address transfer pricing issues, and skilled persons and adequate information to give practical effect to such rules;

(b) It was difficult for many developing countries, just as it was for many developed countries, to strike the balance of enforcing their legitimate taxing rights while ensuring an open, transparent, investment-friendly and fair environment for

[1] See *Official Records of the Economic and Social Council, 2008, Supplement No. 25* (E/2008/45-E/C.18/2008/6), para. 80.

[2] See www.un.org/esa/ffd/tax/.

investors. The skills and informational gaps in many developing countries exacerbated these difficulties;

(c) Another difficulty was the theoretical, rather than practical, nature of much of the analysis and advice on how to address transfer pricing available to tax authorities. It was noted, for example, that although the comparable uncontrolled price method plays a very prominent part in transfer pricing theory, the comparable uncontrolled price was not actually used very much in practice — the method used was overwhelmingly the Transactional Net Margin Method (TNMM), even though this was seen in the theory as being a non-preferred method — a situation currently being reassessed within the Organization for Economic Cooperation and Development;

(d) "Profit split"[3] was another method which had proponents at the meeting, especially for dealing with issues such as the transfer of intangibles;

(e) Lack of comparable data for calculating costs or resale prices of goods and services is a serious problem in many developing countries. Some developing countries used data extracted from developed country databases, such as from European and United States sources, but others took the view that that could be problematic, because the market conditions, including geographical or locational factors (such as "locational savings"[4]) would be so different. Customs data were generally obtained at a lower cost, but needed sophisticated analysis to assist in auditing taxpayers, and still remained only one part of a solution;

(f) The use of different methods in transfer pricing analysis, such as the comparable uncontrolled price, cost plus, TNMM and profit split methods, could give different results, sometimes significantly different, and there was currently only limited, and often overly theoretical guidance on the question of whether one method or the other was appropriate. The administrative difficulties in applying the methods, especially in developing countries, were often not fully taken into consideration;

(g) Price alone could be misleading, as a comparison of prices did not itself reveal what might be different cost structures, such as in sales or marketing, and therefore what would constitute "arm's length" margins. One suggestion was that the UN might have a role in giving guidelines about what were, on their face, acceptable margins on different categories of products.

6. The meeting noted that targeted but non-prescriptive guidance could greatly assist in dealing with the situation, and that, to that end, the United Nations could play a useful role in preparing a practical manual on transfer pricing for policymakers and administrators in developing countries, including a checklist or checklists of issues for consideration, and flowcharts to aid in comprehension. Such a "toolkit" would assist in understanding, prioritizing, sequencing and addressing such issues.

---

[3] This method is often used when businesses are too integrated to allow for separate evaluation, and profit derived from the activity is split. The split is based on the level of contribution of each of the participants.

[4] Where there are savings due to the location (such as reduced production costs or the lower cost of information technology services in some developing countries as compared to developed countries), the issue is whether the savings should be treated as accruing not just to those who purchase the goods or services, but also to those providing the goods or services.

III. Approach taken in the Manual

7. The Manual would incorporate a step-by-step approach to be used by developing countries tax policymakers and administrators for, among other items:

- Understanding the basic issues involved in transfer pricing, including the arm's length standard commonly used to analyse such issues, and the methods of addressing arm's length ranges most commonly followed in the case of different industries and situations
- Drafting transfer pricing legislation, including aspects of the domestic legal framework such as the definition of "related parties" and requirements as to information retention and provision, and penalties — recognizing that any such legislation must be suitable for, and adapted to, the local environment
- Setting up transfer pricing units, including the role of those with legal, economic, accounting and other skills, the relationship to audit teams and to legal advisers, "tax culture" issues, and the relationship between tax authorities and taxpayers (although it was recognized that such issues needed to be addressed more generally than simply in the context of transfer pricing)
- The identification and use of relevant databases, including issues involved in extrapolating non-local material to draw conclusions relating to the local market
- Simplified strategies for identifying arm's length and non-arm's length transactions that are consistent with the underlying themes of the arm's length principle
- Compliance strategies for transfer pricing, including for different sized enterprises
- Identifying where further information is required, and how it can be obtained
- Information that should be provided to taxpayers to assist compliance
- Identification and discussion of some "red flag" issues, such as in the context of addressing contract and toll manufacturing, the identification, ascertainment of ownership and valuation of intangibles, corporate restructures and transfer pricing issues in the context of the provision of services within companies and groups
- The possible role of "locational savings" in transfer pricing analysis
- The role of the views of other countries in transfer pricing (avoiding double taxation) and the use of dispute resolution mechanisms
- The role or otherwise of exchange of information in transfer pricing investigations, including the practical issues such as the delay such a process often involves, the language issues, and possible alternatives, such as exchange of information as part of mutual agreement procedures
- The relationship with customs valuation issues, with suggestions towards developing an integrated approach
- The relationship with thin capitalization issues

- The possible use of safe harbours[5] and the like to more effectively use limited audit capabilities
- A glossary of terms used in the field of transfer pricing.

IV. Since the Amsterdam meeting

8. There has been widespread acceptance among relevant stakeholders, including governmental representatives, civil society and business that clear, practical and technically sound work in this area is to the benefit of all stakeholders in the system.

9. The secretariat has been consulting informally as to the structure of the Manual, looking to some existing Manuals and books on transfer pricing and working with experts, who have been very generous in giving their time and expertise to this area of work. Such processes have been necessarily slow but deliberate.

10. Many of the contacts in this area, from government, academia and the private sector have been asked to begin helping with drafting, and some sample chapters will be available for the annual session.

11. The assistance of the South-South Sharing of Successful Tax Practices Project[6] in assisting this work is particularly acknowledged, especially in identifying successful developing country practices that may assist other developing countries in addressing transfer pricing issues.

V. Guiding principles in drafting the Manual

12. There are a number of guiding principles for drafting the Manual as follows:

- The writing should be as simple and clear as the subject matter permits
- Although the Manual may be translated at a later date, it will first be drafted in English, with a style adapted to the fact that this will not be the first language of most users and is only one of the six official United Nations languages. The aim is to use a simple and crisp style
- The "value add" of the Manual is to be its practicality — addressing real issues for developing countries, so it should reflect the realities, and can usefully point out differences between the reality and the theory of transfer pricing

---

[5] Defined by the IBFD *International Tax Glossary* as follows: "A safe harbour may be defined as an objective standard or measure, such as a range, percentage, or absolute amount, which can be relied on by a taxpayer as an alternative to a rule based on more subjective or judgmental factors or uncertain facts and circumstances. A safe harbour cannot normally be used to the disadvantage of a taxpayer. ..."

[6] This is a project undertaken by the Special Unit on South-South Cooperation of the United Nations Development Programme (UNDP), in close cooperation with the Financing for Development Office of the Department of Economic and Social Affairs of the Secretariat and two NGOs: the New Rules for Global Finance Coalition and the Tax Justice Network. It is designed to enhance cooperation among developing countries on tax matters by sharing experiences, and also to help identify areas where cooperation among developing countries needs to be enhanced to ensure that international tax norms are shaped by developing country perspectives, experiences and realities in their development and application.

- It needs to be geared to the inevitable limitations in some country's administrations, and deficits in information and skills that many countries suffer from in this area. Issues of capability, focus and efficiency in dealing with limited resources should, in particular, bear strongly on the approach taken in the Manual

- Practical examples relevant to developing countries will be especially useful. The concepts of "possible red flag issues" and of flowcharts discussed at the Amsterdam meeting are of great potential in terms of practical benefit, though it is recognized that they need to be carefully contextualized and explained (like the Manual itself), so as not to mislead

- This project is related to the work of the Committee, with other partners, on South-South Sharing of Successful Tax Practices, and in that spirit, input from developing countries' experts is particularly sought, all with different experiences in the area. The Committee will be following up further leads in developing countries, or with developed country experts with special knowledge of developing country issues and priorities

- Finally, a "life cycle" approach has informed this work — what suits a country at the beginning of its transfer pricing journey will not usually be right for it later, and vice versa.

VI. Next steps

13. A copy of the draft outline of the Manual is attached as the annex to the present document. While this will be considerably refined as the project develops, it forms a basis for comment and for developing initial drafting for the Manual.

14. At the time of writing of the present note (August 2009), the first drafts were awaited for discussion. They will be submitted to the Committee as part of the consultation and refinement process. The Committee will continue to work closely with networks of governmental, academic, business and practitioners to refine and develop chapters of the Manual, and will explore partnerships to speed up that work and work towards an online, hyperlinked version.

Annex

Transfer Pricing Manual

for

Developing Countries

2009 Draft Concept[1]

Ver 2

1 This draft should not be taken as representing the views of the United Nations or its Secretariat or of the UN Committee of Experts on International Cooperation in Tax Matters. The document draws on various publicly available materials from tax authorities and others and from the input of the Ad Hoc Experts on Transfer Pricing organised by U.N. Department of Economic and Social Affairs Financing for Development Office, August 2008. [N.B. *authors and others assisting will, of course be acknowledged appropriately*]

Table of Contents

Introduction and Purpose **11**

Chapter 1: Basics of Transfer Pricing **12**

a. What is Transfer Pricing 12

b. Transfer Pricing and the UN and OECD Model Tax Conventions 12

c. Transfer Pricing as an area of Taxation Law 12

d. The Arm's Length Standard 12

e. Introduction and Explanation of the Annexed Flowcharts 14

Chapter 2: Establishing Transfer Pricing Capability in a Tax Administration **14**

a. The Relationship Between Policy and Administration Issues 14

b. Setting up Policy Capacity 14

c. Assessing Administrative Capability 14

d. Setting up a Transfer Pricing Unit 14

Chapter 3: Policy and Administration Considerations **15**

a. Overview 15

b. Compliance Strategies and Policies 16

c. Compliance Programs 17

d. Transfer Pricing Adjustments and Penalties 18

e. Dispute Resolution and Avoidance 19

f. Education and Information Strategies 19

Chapter 4: Legal Framework **19**

a. Domestic Approaches 19

b. Tax Treaties 20

c. Legislative and Regulatory - Country Specific Examples 20

d. Guidance and Rulings - Country Specific Examples 21

e. Relevant Case Law 22

f. Non Transfer Pricing Considerations 22

Chapter 5: Transfer Pricing Analysis in Practice **22**

a. Introduction 22

b. Flowchart 22

c. Functional Analysis 22

d.	Comparability	23
e.	Corporate Level Issues and Understanding Corporate Compliance Strategies	23
f.	Transaction Specific Issues	24
g.	Industry Specific Issues	24
Chapter 6:	**Transfer Pricing Methods**	**24**
a.	Introduction	24
b.	Current Methods	24
c.	Alternatives	25
d.	Case Studies	25
Chapter 7:	**Transfer Pricing Analysis and Methods - Special Issues**	**25**
a.	Location Savings	25
b.	Market Penetration Strategies	25
c.	Business Restructuring	25
d.	Tax Holidays and transfer pricing	25
e.	Accounting and Corporate Governance developments	25
f.	Customs valuation issues	25
g.	VAT/GST/Withholding Tax Issues	25
h.	Foreign Investments	25
i.	Treatment of Intangibles	25
j.	Intra-Group Services and Commodities Trading	26
k.	Cost Contribution Arrangements (CCAs)	26
l.	Intra-Group Finance	26
Chapter 8:	**Documentation**	**26**
a.	Introduction	26
Chapter 9:	**Risk Assessment (RESTRICTED ACCESS? - to be determined)**	**27**
a.	Selecting Cases for initial Risk/Documentation Review	27
b.	Selecting Cases for Audit	27
c.	Examples of Country Specific Practices	27
d.	Safe Harbours	27
e.	Administration	27
Chapter 10:	**Audit – Processes and Procedures**	**28**
a.	Strategy	28
b.	Simultaneous Tax Audits	28

c.	Country Specific Best Practices	28
d.	Effective Use of Resources	28
Chapter 11:	**Adjustments, Disputes and Dispute Resolution and Avoidance**	**28**
a.	Introduction to dispute avoidance and resolution in a domestic and international context	28
b.	Transfer Pricing adjustments, including corresponding adjustments	28
c.	Penalties	28
d.	The Mutual Agreement Procedure (MAP) under tax treaties	28
e.	Settlements and alternative dispute resolution	28
f.	The Role of Courts and Tribunals in Transfer Pricing Dispute Resolution	28
g.	Advance Pricing Agreements (APAs) – policy and administrative considerations	29
h.	Developing an APA program – practical considerations	29
Chapter 12:	**Government to Government (RESTRICTED ACCESS? - to be determined)**	**29**
Chapter 13:	**Sources of Information**	**29**
a.	Relevant Bodies (with hyperlink where available):	29
b.	Research	30
Chapter 14:	**Training and Capacity Building Resources**	**30**
a.	South – South Experience	30
b.	CATA, CIAT, CREDAF, IOTA, SGATAR, SADC	30
c.	UN - Related	30
d.	OECD	30
e.	IMF, World Bank etc	30
f.	IBFD	30
g.	Funding	30
Appendices	**31**	
a.	Glossary of Terms	31
b.	Frequently Asked Questions (FAQs)	31
c.	Checklist [and possibly also a flowchart] for a transfer pricing set-up	31
d.	Checklist of possible transfer pricing issues – General	31
e.	Table of main differences and possible uses of different Methods	31
f.	Flowchart of a typical transfer pricing scenario (with non-typical extensions)	31
g.	Current Databases – a Survey	31
h.	Checklist [and possibly also flowchart] on documentation	31
i.	Bibliography	31

Introduction and Purpose

This Manual is intended to be used as a point of reference by tax administrations to address, in a fair and informed manner, the complex matters that may arise when dealing with transfer pricing issues. It is only a guide to some possible avenues of enquiry and approaches, and must be considered in the context of a specific country's legal requirements and business practices. This Manual is designed especially to respond to the needs of developing countries and draws on, in particular, transfer pricing experiences from these countries.
This Manual is premised upon the application of the arm's length standard which determines whether the prices between parts of a multinational enterprise (MNE) properly reflect the functions and assets of, and the risks incurred by, the local part of the MNE. It is acknowledged that there is an issue of whether the arm's length standard is always an appropriate one, especially for developing countries, and whether alternatives approaches need to be considered. Whilst the importance of this issue is acknowledge and will be discussed later, it is not the central theme of this manual. It is intended to focus on the most effective, efficient and transparent ways of applying internationally accepted transfer pricing concepts and rules.

In view of the current widespread acceptance and usage of the "**arm's length standard**" (or "arm's length principle" ALP), included in the UN Model Tax Convention (UN MTC), and the benefit, in avoiding double taxation, of common approaches across countries, this Manual addresses currently accepted approaches of applying this standard in a developing country context. The larger issues of alternative approaches to addressing transfer pricing question is left for separate consideration as an important but parallel issue which is merely informed by the content of this manual.

The issues addressed and suggestions made in this Manual draw widely upon guidance made available by tax authorities and others experts, as well as relevant publications. It is envisioned that in a later version of this document there will be more hyperlinks to relevant public documents available on the internet, and more extensive direct citation. The Manual remains a practical document, however, not an academic treatise.
This Manual acknowledges the importance of investment to the development plans of most countries, and the importance to most developing countries, therefore, of an attractive investment climate. It also recognises, however, that such a favourable investment climate is entirely consistent with a robust but fair defence of revenues properly due to a country, in accordance with its law. It also recognises the advantages to business interests of a thoughtful, targeted, transparent, service oriented and not unduly burdensome and costly approach by tax administrations to the taxation of activities of investors, including multinational enterprises (MNEs) in their jurisdiction.

At this stage the Manual does not deal with the special case of banking in any detail. The Manual also does not separately address issues of branches and permanent establishments, nor deals with the Mutual Agreement Procedure (MAP) in any great detail, although the MAP is frequently relied on in transfer pricing cases, it has a broader application. These subjects may either be addressed in a later version of the Manual, or may be the subject of special specific guidance.

Chapter 1: Basics of Transfer Pricing

What is Transfer Pricing

"Transfer pricing is the area of law, accounting and economics that is concerned with ensuring that prices charged between associated enterprises [such as companies in the same group] for the transfer of goods, services and intangible property are in accordance with the arm's length principle. Transfer pricing principles may also be applied in the context of transactions – or dealings – between different parts of a single enterprise, e.g. between a head office and permanent establishment and between different permanent establishments of the same enterprise."[2]

….. [More explanation plus examples]
[including addressing issue of whether the reference to "pricing" can be misleading]

Transfer Pricing and the UN and OECD Model Tax Conventions

- *History*
- *Relevance for Developing Countries*
- *transfer pricing and double taxation - the role of the UN and OECD Double Tax Conventions and treaties based upon them*
- *the role of the OECD Transfer Guidelines OECD Transfer Pricing Guidelines and their relevance to treaties based on the United Nations Model Tax Convention?*

Transfer Pricing as an area of Taxation Law

- *Relationship to other domestic and international issues*
- *The relationship to other tax laws*
- *Relationship to customs issues (brief outline of issue – differences)*

The Arm's Length Standard

Transfer pricing is important because of its impact on the allocation of profits and losses (and therefore the corresponding tax bases) of different parts of a multinational group across different jurisdictions. If the pricing of transactions between parts of an MNE located in different jurisdictions is incorrect, a jurisdiction may be denied its legitimate tax revenues. However, if jurisdictions take different views on a transfer pricing matter, the MNE involved may be subject to unrelieved economic double taxation.

A common concern is that dealings between parts of an MNE might be manipulated to shift profits to low tax jurisdictions, with losses and attendant deductions, moved to or retained in high tax jurisdictions. Transfer pricing and the arm's length standard seek to counter such practices, however the scope of transfer pricing is however broader than just anti-avoidance, and is as applicable to dealings without tax motivation.

---

2 IBFD International Tax Glossary (words in parentheses added)

The arm's length standard is internationally widely accepted as the preferred basis for determining the transfer prices for transactions between related parties, and is found in the UN and OECD Model Tax Conventions. This Manual seeks to assist developing countries by exploring what the application of this standard means in practical terms, and how it can be most effectively administered within applicable resource and other constraints.
An important initial question for any country is: has the arm's length standard been accepted as the governing principle in that country? In most cases, the answer will be, "at least for the present, yes". In theory, the wide acceptance of the arm's length standard should minimise the possibility for economic double taxation, as other countries are more likely to accept an arm's length adjustment and give relief from double taxation by way of corresponding adjustment.

According to the arm's length standard, a transfer price is acceptable if a transaction between related parties takes place at an arm's length price. With an arm's length price quite simply defined as the price which would have prevailed if the transaction had taken place between independent enterprises acting under the same or similar circumstances.

In applying the arm's length standard there is a comparison of "conditions" made or imposed between related parties with those which would be made between independent enterprises. This comparison is undertaken in order to determine whether these conditions have affected the prices used, and hence whether that a transfer pricing adjustment needs to be made - recalculating the profits which would have accrued to the enterprise in the absence of such conditions, or adjusting the conditions themselves to replicate those which would be made between independent enterprises.

Under Article 9 of the UN and OECD Model Tax Conventions, two enterprises are related parties with respect to each other if (in general) one of them participates directly or indirectly in the management, control or capital of the other enterprise; or they are under common control. This includes the relationship of separate legal entities in a group, such as a subsidiary and its parent company, or two parts of a single legal entity, being a branch (permanent establishment) and head office. Domestic legislation will often contain a more prescriptive definition of related parties, for the purposes of application of domestic transfer pricing rules.

In some countries, even without specific transfer pricing rules, the administration is empowered to disregard certain transactions altering the incidence of tax, and make adjustments to counteract the effects of such transactions. These provisions often allow the application of arm's length methodologies and the computation of an arm's length price or range.

Introduction and Explanation of the Annexed Flowcharts

- *There are several possible flowcharts:*
  - *the transfer pricing process for price setting or evaluation by a multinational*
  - *Flowcharts for different industries might also be possible.*
  - *A flowchart of the tax administration process (starting with identification of taxpayers – related party transactions – risk assessment etc).*
  - *A flowchart on possible documentation requirements [at least in one sample developing country with successful practices, might also be useful]*

Chapter 2: Establishing Transfer Pricing Capability in a Tax Administration

The Relationship Between Policy and Administration Issues

- *include issues of coordinating cross-ministerial responsibilities*

Setting up Policy Capacity

- .....

Assessing Administrative Capability

- *Assessing the level of development/ capability of the Tax Administration:*
  - *level of education and expertise*
  - *legal environment,*
  - *tax treaties (exchange of info)*
  - *availability of information in country/tax administration*

Setting up a Transfer Pricing Unit

- *Types of structure:*
  - *Centralised*
    Advantage: coordination, easy in start-up phase, fast building up of knowledge
    Disadvantage: risk of being in ivory tower

- *Decentralised*
  Advantage: short lines of communication with tax inspectors, easy spread of knowledge, combined industry and TP knowledge, more fit for later phase
  Disadvantage: coordination problems

- *Elements of organisation*
- *The legal framework*
- *Administrative policy making*
- *Coordination*

- *Staffing*
  - *Economists*
  - *Lawyers*
  - *Accountants*
  - *Auditors*
  - *Database-experts*
  - *Project management skills*
- *Budget and Funding*
- *Also: management information, registration/recording of TP-cases and adjustments*

Chapter 3: Policy and Administration Considerations

Overview

- *Transfer Pricing Phases/Stages/Life Cycle of the tax administration [Setting the scene]*
- *Influence of stages of an organisation on the organisation, but also on topics to be targeted and knowledge to be developed. For example: in first stage start with small number of industries of key importance and tackle most common problems. Also relevant for legislation- for example: start with general legislation and not with trying to tackle very complex issues.*
- *Elements discuss in this chapter are processes in the organisation. They could be structured in separate units or could be combined. At least the interfaces and interrelations between the elements should be taken care of. Not in all phases all the processes should be equally important (e.g. in start-up no APA)*

- *Transfer Pricing for Small and Medium-sized Enterprises (SMEs) – special issues? Streamlined compliance and administration?*
- *Acceptance and understanding of arm's length principle in domestic law*
- *Domestic Definition of related parties (who is covered legally, and in practice)*
- *Documentation and tax filing requirements*
- *Approach to comparability (process etc)*
- *Determining ALP (methods etc)*
- *TP-database use*
- *Dispute resolution and avoidance (including APAs, MAP etc)*
- *Adjustments (types: primary, secondary, corresponding) and penalties (types/scope)*
- *Attribution of profits to a PE – related issue*
- *TP-intelligence (detection of cases, knowledge centre etc)*
- *TP education/instruction (refer to heading below)*
- *Links to stakeholders – business and others*
- *Specific Country practices – [would be best integrated into the topics above rather than as a free-standing list, with links to more detailed "local explanations" where appropriate].*

Compliance Strategies and Policies

- *More or less the caveat: think before you leap.*
    - *Specific Focus:*
        - *Decide whether to set up coordination or separate TP groups per industry*
        - *Analysis of the importance of industries in the country - develop knowledge on top% of industries.*
        - *Develop solutions (administrative, legislative etc) for typical problems (see for example Mexican example of dealing with maquiladores)*
    - *Internal process: role of TP-unit - Options (also depending on life cycle):*
        - *advice only*

- *compulsory consultation*
- *TP-unit will take over case handling*

- *Case selection process, some options:*
  - *risk rating system (refer to chapter on risk assessment)*
  - *random*
  - *based on internal information*
  - *building up knowledge of your most important clients (international structure, global stream of transactions, high level idea of functions performed, financial statement analysis)*

- *Additional issues and attitude-shifting:*
  - *retrospective: audit focused on adjustments with risk of lot of MAPs (especially with transactions with large number of countries)*
  - *prospective: adjustments limited to clear cut cases, in other situation strive for good future solution together with taxpayer. High level of transparency: TP is not exact science. Open attitude towards taxpayer may help a lot in reaching a solution. Look to APAs program in time.*

- *Developing transparency as a value– relationship of regulation and transparency.*
- *Contacts with TP-consultants - A strategy could be to have informal meetings periodically to discuss both process and substantive issues*
- *Voluntary Compliance – options for MNEs*
- *SME and Large Taxpayer Approach (distinguish – thresholds?)*
- *Simplified Approaches*
  - *Optional Safe Harbours? Pros and cons in policy and administration terms –including treaty issues and potential economic double taxation if not in accordance with ALS*
  - *Fixed Rates or Ranges of Return*
    - *General*
    - *Industry Specific*
    - *Transaction Specific*

Compliance Programs

- *Documentation requirements – a variable geometry (SMEs/ MNCs)?*

- *Filing requirements, Questionnaires and Risk Rating/Statistical Tools*
- *Enforcement powers*
- *Tax inspectors (general)*
- *TP-audit - Introducing the idea of an iterative process (e.g. risk analysis, high level functional analysis, initial interview, initial audit (high level), thorough audit etc):*

  i. *Initial risk/documentation review*

     - *Criteria for Selection – (see compliance strategies and policies above)*
     - *Industry Approach*

  i. *Selecting Cases to proceed to Audit*

     - *Criteria for Selection*

  ii. *Undertaking an Audit*

     - *Timing, process etc*

  iii. *Country specific practices*

     - Benchmarking/Pre-determined Rates of Return (e.g. Brazil)

  iv. *Typical cases – examples*

  v. *Specific industries - examples*

Transfer Pricing Adjustments and Penalties

- *Refer to specific chapter covering this topic, but provide summary of:*
- *Use/type of adjustments*
  - *Primary*
  - *Secondary*
  - *Corresponding*
- *Penalties*
  - *Base - shortfall (tax or taxable income)?*
  - *Documentation*
  - *Taxpayer size/category*

Dispute Resolution and Avoidance

- *Refer to specific chapter covering this topic, but provide summary of concepts/tools:*
  - *Settlement*
  - *Litigation*
  - *Procedure for MAP access – relationship to domestic law rights*
  - *Competent authority - Some "best" practices to be found at OECD site (MEMAP) – relevance to developing countries explored.*
  - *Advance Pricing Agreements (APAs)*

Education and Information Strategies

- *Internal:*
  - *Organisation of education (in-house or external - e.g. international organisations)*
  - *Diversification of education: experts, TP-network, general tax inspectors and industry experts. Focus different defending on moment in lifecycle (start with small group of experts etc)*
  - *Strategy: focus on practical education directly followed by practical application in practice to increase effect, instead of educating large groups that don't use the material in practice.*
  - *Education not only on theoretical framework but also on audit strategy, practical considers, industry specific etc*
- *External*
  - *working with stakeholders, tax culture issues and the relationship(s) between informational strategies and compliance*
- *Sources of Information*

Chapter 4: Legal Framework

Domestic Approaches

- *Definition of related parties*
  - *Article 9*
  - *Domestic law (with examples)*

- *Types of transfer pricing rules:* Legislation, Regulations, Rulings, and other Guidance
- *Discuss use of different types to achieve different objectives*

Tax Treaties

- *Limits Domestic Law*
- *Scope of treaty (i.e. can a TP adjust be made under treaty in absence of domestic legislation?)*

Legislative and Regulatory - Country Specific Examples

- *Relevant elements (and common points) of Country Transfer Pricing Legislation and Regulations [more to be added – this will have to be fairly basic to be manageable, especially with updates occurring – possibly more material in appendices]*
  - *Argentina*
  - *Australia*

    Australia has specific transfer pricing legislation, found in Division 13 of the Income Tax Assessment Act 1936. Division 13 prescribes the application of the arm's length standard, but does not have automatic application as it is applicable at Commissioner's discretion. There are however significant penalties for taxpayers who do apply the arm's length standard voluntarily.
    The application of Division 13 by the Commissioner merely requires; a supply or acquisition of property (defined to include services) under an international agreement (broadly defined) between two or more parties; that the Commissioner be satisfied that the parties to the transaction were not dealing at arm's length; and, that the Commissioner exercise his discretion to apply it. Notably, the application of Division 13 does *not* require the parties to be related (or associated), only that they have not dealt at arm's length.
  - *Brazil*
  - *China*
  - *Egypt*
  - *France*
  - *Germany*
  - *Hungary*
  - *India*
  - *Indonesia*
  - *Italy*

- *Japan*
- *Kazakhstan*
- *Kenya*
- *Malaysia*
- *Mexico (new rules interesting to discuss)*
- *Netherlands*
- *New Zealand*
- *Nigeria*
- *Norway*
- *Pakistan*
- *Singapore*
- *South Africa*
- *Thailand*
- *United Kingdom*
- *United States of America*

  > US Code of Federal Regulations (Transfer Pricing – refer to Reg. 1482)

Guidance and Rulings - Country Specific Examples

- *Relevant elements of Transfer Pricing Guidance/Rulings/ Examples of application of methods, country rulings etc*

Australia

Under its public ruling program, the Australian Taxation Office (ATO) has released numerous rulings on transfer pricing and related subjects. These rulings are binding on the Commissioner insofar as they are relied on by, and are applicable to, a taxpayer. The topics covered by these rulings include: Transfer Pricing Methodologies; Intra-Group Services; Cost Contribution Agreements; Loan Arrangements; and, a number of other practical and interpretive matters.

> Australian Taxation Office: Transfer Pricing Rulings and Determinations

Notably, the ATO has issued public ruling TR98/11, which provides comprehensive practical guidance on the preparation of transfer pricing documentation, and the process for setting and reviewing international transfer prices, for Australian tax purposes.

> Australian Taxation Office: Taxation Ruling TR 98/11

In addition to the rulings and determinations, the ATO has also issued a number of transfer pricing specific papers, covering issues ranging from a basic introduction to transfer pricing concepts and risk assessment through to more specific issues such as marketing intangibles. The ATO continues to be active in this area, recently releasing a draft paper on business restructures (May 2007) and a draft paper on intra-group finance guarantees and loans (June 2008).

> Australian Taxation Office: Transfer Pricing Papers

Relevant Case Law

Non Transfer Pricing Considerations

- *Description of the issues and caveat to regard cases not only from one perspective, but also the other issues (for example intensive TP audit of a cases where all operational profit is eroded by interest is not very valuable):*
    - *Taxing Natural Resources*
    - *Thin Capitalisation*
    - *Anti-Earning Stripping Rules*
    - *Erosion of the Tax Base*
    - *CFC Rules*
    - *Permanent Establishment (existence)*
    - *General Anti-Avoidance Rules*

Chapter 5: Transfer Pricing Analysis in Practice

Introduction

Flowchart

Functional Analysis

- *Introduction (purpose and importance)*
- *Fact finding process*
- *Analysis of functions, assets and risks*
- *Industry analysis*
- *Entity classifications*

Comparability

- *Determination of comparable companies and performing comparability analysis (determines an arm's length return for the functions assets and risks attributed). Dealing with outlying companies – highly profitable/ loss-making*
- *The arm's length "range" – arithmetical mean vs. inter-quartile range or other statistical tools*
- *How comparable are proposed comparables? Possible differences on the basis of:*
  - *Quantity differences*
  - *Geographical differences*
  - *End-use differences*
  - *Quality / characteristic differences*
  - *Difference in the lifecycle of the product*
  - *Differences in terms of trade*
  - *Different channels of distribution*
  - *Other relevant economic differences*
- *Location savings – how does the concept operate – how are they valued and to whom do they belong [Refer to special issues chapter]*
- *Market Penetration strategies and transfer pricing (e.g. reduced prices, higher marketing costs etc) [Refer to special issues chapter]*

Corporate Level Issues and Understanding Corporate Compliance Strategies

- *Related Party Dealings*
- *Associate Enterprises/Related Parties – definition and identification*
- *MNEs Transfer Pricing Global Policies and Strategies*
- *Financial*
  - *Profit Level Indicators*
    - *Link to materials such as the IRS APA guide*
  - *Ranges*
    - *Link to materials such as the IRS APA guide*

Transaction Specific Issues

- *[Introduce/highlight issues, but elaborate in later chapter]*
- *Intra-Group Services*
- *Intra-Group Finance*
- *Intangibles*
- *CCAs*

Industry Specific Issues

- *Oil & Gas*
    - *Resource Tax Regimes*
- *Mining*
- *High technology industries*
- *Services sector*

Chapter 6: Transfer Pricing Methods

Introduction

- *Use of Methods*
- *Selection of method(s) (how, why and use of more than one method)*
- *Is it any longer useful to think in terms of a hierarchy of methods?*

Current Methods

- *[Include examples for each method?]*
- *Comparable Uncontrolled Price (and its derivatives – CUT etc)*
- *Resale Price Method*
- *Cost-Plus Method*
- *Transactional net Margin Method*
- *Profit Split Methods*

- *Comparable Profits Method*
- *Other (i.e. modified resale price and use of any method, provided AL price)*

Alternatives

- *Global Formulary Apportionment – an introduction (alternative method for applying the ALS or alternative to the ALS?)*

Case Studies

- *[include a case study that highlights issues that may arise, i.e. Use of CPM v TNMM by two different countries]*

Chapter 7: Transfer Pricing Analysis and Methods - Special Issues

Location Savings

- *what are they and to whom do they belong (how to allocate)*

Market Penetration Strategies

Business Restructuring

Tax Holidays and transfer pricing

Accounting and Corporate Governance developments

- E.g. Fin 48
- .....

Customs valuation issues

VAT/GST/Withholding Tax Issues

Foreign Investments

Treatment of Intangibles

- *Defining & Identifying Intangibles*

- *Ownership*
    - *Legal*
    - *Economic*
- *Transfer of Intangibles*
    - *Know How*
    - *"Mixed bundles"*
- *Valuation*
- *Functions, Assets and Risks*
    - *Research & Development*
    - *Other cost contribution*
    - *Transfers and licensing*
- *Royalties Rates*

Intra-Group Services and Commodities Trading

- *Technical Services*
- *Administrative services*
- *[Practical application of methods]*
- *Administrative concessions (non-core, de minimis etc)*

Cost Contribution Arrangements (CCAs)

- *Research & Developments*
- *Other cases*

Intra-Group Finance

Chapter 8: Documentation

Introduction

- *What is it?*

- *[Developing country examples???]*
- *Burden of proof/legal requirements*
- *SME v Large Business / other thresholds*
- *PATA*
- *EU Joint Transfer Pricing Forum*
- *Documentation related penalties*

Chapter 9: Risk Assessment (RESTRICTED ACCESS? - to be determined)

Selecting Cases for initial Risk/Documentation Review

- *Criteria for Selection – see strategies & policies above*
- *Industry Approach*

Selecting Cases for Audit

- *Existence/quality of TP documentation*
- *Commercial reality check*
- *Presence of Specific transactions*

Examples of Country Specific Practices

- *Benchmarking/Pre-determined Rates of Return (e.g. Brazil)*
- *……*

Safe Harbours

- *Policy issues*
- *Tax Treaty, Corresponding Adjustment issues and Economic Double Taxation*

Administration

Chapter 10: Audit – Processes and Procedures (RESTRICTED ACCESS? - to be determined)

Strategy

Simultaneous Tax Audits

Country Specific Best Practices

Effective Use of Resources

Chapter 11: Adjustments, Disputes and Dispute Resolution and Avoidance

Introduction to dispute avoidance and resolution in a domestic and international context

Transfer Pricing adjustments, including corresponding adjustments

- *Primary*
- *Secondary*
- *Corresponding (who/when and Article 9(2))*

Penalties

The Mutual Agreement Procedure (MAP) under tax treaties

Settlements and alternative dispute resolution

The Role of Courts and Tribunals in Transfer Pricing Dispute Resolution

- *The role of courts and tribunal*
- *Dealings with taxpayers, administrators and possible impact on policy makers*
- *The domestic law setting*

- *The international context*
- *Dealing with skilling up and consistency issues*
- *Dealing with workloads*
- *Are there possibilities for greater cooperation or at least greater sharing of experiences internationally?*

Advance Pricing Agreements (APAs) – policy and administrative considerations

Developing an APA program – practical considerations

Chapter 12: Government to Government (RESTRICTED ACCESS? - to be determined)

- *Governance*
- *Enforcement Powers*

Chapter 13: Sources of Information

Relevant Bodies (with hyperlink where available):

- AATA – *Association of African Tax Administrators*
- ATAIC – *Association of Tax Authorities of Islamic Countries*
- CATA - *Commonwealth Association of Tax Administrations*
- CIAT - *The Inter-American Center of Tax Administrations/Centro Interamericano de Administraciones Tributarias*
- COTA - *Caribbean Organization of Tax Administrators*
- CREDAF - *Centre de Rencontres et d'Etudes des Dirigeants des Administrations Fiscales*
- EUJTPF – *EU Joint Transfer Pricing Forum*
- IBFD – *International Bureau of Fiscal Documentation*
- IOTA – *Inter-European Organisation of Tax Administrations*

- OECD – *Organisation for Economic Co-operation and Development*
- PATA – *Pacific Association of Tax Administrations*
- PITAA – *Pacific Islands Tax Administrators Association*
- SADC – *Southern African Development Community*
- SGATAR – *Study Group on Asian Tax Administration and Research*
- *[others]*

Research

- .....

Chapter 14: Training and Capacity Building Resources

South – South Experience

CATA, CIAT, CREDAF, IOTA, SGATAR, SADC

UN - Related

OECD

Organisation for Economic Co-operation and Development

IMF, World Bank etc

IBFD

- Open Courses
- In-house Courses
- On-line Courses

Funding

APPENDICES

Glossary of Terms

Frequently Asked Questions (FAQs)

Checklist [and possibly also a flowchart] for a transfer pricing set-up

Checklist of possible transfer pricing issues – General

- *Checklist for (non-financial) services industries*
- *Checklist for financial services industries*
- *Checklist for commodities trading*
- *Checklist for Pharmaceuticals industries*
- *Checklist[s] for Oil and Gas/ Mining industries*
- *Checklist for transactions involving intangible property*
- *Checklist for telecommunications Industry*
- *Checklist for the Media and entertainment*

Table of main differences and possible uses of different Methods

Flowchart of a typical transfer pricing scenario (with non-typical extensions)

Current Databases – a Survey

Checklist [and possibly also flowchart] on documentation

Bibliography